

**ASSEMBLY, No. 246**

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**STATE OF NEW JERSEY**

**220th LEGISLATURE**

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PRE-FILED FOR INTRODUCTION IN THE 2022 SESSION

**Sponsored by:**

**Assemblywoman NANCY F. MUNOZ**

**District 21 (Morris, Somerset and Union)**

**Assemblyman BRIAN BERGEN**

**District 25 (Morris and Somerset)**

**Co-Sponsored by:**

**Assemblymen Rooney, DiMaio, Clifton, McGuckin, Thomson, S.Kean,**

**Assemblywomen Piperno, Matsikoudis, Flynn, McCarthy Patrick and  
Eulner**

**SYNOPSIS**

Authorizes municipal challenge to non-redevelopment housing projects ordered by COAH unless order is based on exclusionary zoning; excludes flood-prone land from affordable housing vacant land analysis; provides housing obligation cap.

**CURRENT VERSION OF TEXT**

Introduced Pending Technical Review by Legislative Counsel.



**(Sponsorship Updated As Of: 3/17/2022)**

1 AN ACT concerning affordable housing, vacant land analysis, and  
 2 municipal challenges to non-redevelopment housing projects  
 3 ordered by COAH, amending P.L.1985, c.222 and P.L.1995,  
 4 c.231, and supplementing chapter 16A of Title 58 of the Revised  
 5 Statutes.

6  
 7 **BE IT ENACTED** *by the Senate and General Assembly of the State*  
 8 *of New Jersey:*

9  
 10 1. Section 4 of P.L.1985, c.222 (C.52:27D-304) is amended to  
 11 read as follows:

12 4. As used in **[this act]** P.L.1985, c.222 (C.52:27D-301 et al.):

13 a. "Council" means the Council on Affordable Housing  
 14 established in **[this act]** P.L.1985, c.222 (C.52:27D-301 et al.),  
 15 which shall have primary jurisdiction for the administration of  
 16 housing obligations in accordance with sound regional planning  
 17 considerations in this State, and any successor body, temporary or  
 18 otherwise, that obtains such primary jurisdiction.

19 b. "Housing region" means a geographic area of not less than  
 20 two nor more than four contiguous, whole counties which exhibit  
 21 significant social, economic and income similarities, and which  
 22 constitute to the greatest extent practicable the primary metropolitan  
 23 statistical areas as last defined by the United States Census Bureau  
 24 prior to the effective date of P.L.1985, c.222 (C.52:27D-301 et al.).

25 c. "Low income housing" means housing affordable according  
 26 to federal Department of Housing and Urban Development or other  
 27 recognized standards for home ownership and rental costs and  
 28 occupied or reserved for occupancy by households with a gross  
 29 household income equal to 50% or less of the median gross  
 30 household income for households of the same size within the  
 31 housing region in which the housing is located.

32 d. "Moderate income housing" means housing affordable  
 33 according to federal Department of Housing and Urban  
 34 Development or other recognized standards for home ownership  
 35 and rental costs and occupied or reserved for occupancy by  
 36 households with a gross household income equal to more than 50%  
 37 but less than 80% of the median gross household income for  
 38 households of the same size within the housing region in which the  
 39 housing is located.

40 e. "Resolution of participation" means a resolution adopted by  
 41 a municipality in which the municipality chooses to prepare a fair  
 42 share plan and housing element in accordance with **[this act]**  
 43 P.L.1985, c.222 (C.52:27D-301 et al.).

44 f. "Inclusionary development" means a residential housing  
 45 development in which a substantial percentage of the housing units

**EXPLANATION** – Matter enclosed in bold-faced brackets **[thus]** in the above bill is  
 not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

1 are provided for a reasonable income range of low and moderate  
2 income households.

3 g. "Conversion" means the conversion of existing commercial,  
4 industrial, or residential structures for low and moderate income  
5 housing purposes where a substantial percentage of the housing  
6 units are provided for a reasonable income range of low and  
7 moderate income households.

8 h. "Development" means any development for which  
9 permission may be required pursuant to the "Municipal Land Use  
10 Law," P.L.1975, c.291 (C.40:55D-1 et seq.).

11 i. "Agency" means the New Jersey Housing and Mortgage  
12 Finance Agency established by P.L.1983, c.530 (C.55:14K-1 et  
13 seq.).

14 j. "Prospective need" means a projection of housing needs  
15 based on development and growth which is reasonably likely to  
16 occur in a region or a municipality, as the case may be, as a result  
17 of actual determination of public and private entities. In  
18 determining prospective need, consideration shall be given to  
19 approvals of development applications, real property transfers and  
20 economic projections prepared by the State Planning Commission  
21 established by sections 1 through 12 of P.L.1985, c.398 (C.52:18A-  
22 196 et seq.).

23 k. "Disabled person" means a person with a physical disability,  
24 infirmity, malformation or disfigurement which is caused by bodily  
25 injury, birth defect, aging or illness including epilepsy and other  
26 seizure disorders, and which shall include, but not be limited to, any  
27 degree of paralysis, amputation, lack of physical coordination,  
28 blindness or visual impediment, deafness or hearing impediment,  
29 muteness or speech impediment or physical reliance on a service or  
30 guide dog, wheelchair, or other remedial appliance or device.

31 l. "Adaptable" means constructed in compliance with the  
32 technical design standards of the barrier free subcode adopted by  
33 the Commissioner of Community Affairs pursuant to the "State  
34 Uniform Construction Code Act," P.L.1975, c.217 (C.52:27D-119  
35 et seq.) and in accordance with the provisions of section 5 of  
36 P.L.2005, c.350 (C.52:27D-123.15).

37 m. "Very low income housing" means housing affordable  
38 according to federal Department of Housing and Urban  
39 Development or other recognized standards for home ownership  
40 and rental costs and occupied or reserved for occupancy by  
41 households with a gross household income equal to 30% or less of  
42 the median gross household income for households of the same size  
43 within the housing region in which the housing is located.

44 (cf: P.L.2008, c.46, s.5)

45

46 2. Section 7 of P.L.1985, c.222 (C.52:27D-307) is amended to  
47 read as follows:

1       7. It shall be the duty of the council, seven months after the  
2 confirmation of the last member initially appointed to the council,  
3 or January 1, 1986, whichever is earlier, and from time to time  
4 thereafter, to:

5       a. Determine housing regions of the State;

6       b. Estimate the present and prospective need for low and  
7 moderate income housing at the State and regional levels;

8       c. Adopt criteria and guidelines for:

9       (1) Municipal determination of its present and prospective fair  
10 share of the housing need in a given region which shall be  
11 computed for a 10-year period.

12       Municipal fair share shall be determined after crediting on a one-  
13 to-one basis each current unit of low and moderate income housing  
14 of adequate standard, including any such housing constructed or  
15 acquired as part of a housing program specifically intended to  
16 provide housing for low and moderate income households.  
17 Notwithstanding any other law to the contrary, a municipality shall  
18 be entitled to a credit for a unit if it demonstrates that (a) the  
19 municipality issued a certificate of occupancy for the unit, which  
20 was either newly constructed or rehabilitated between April 1, 1980  
21 and December 15, 1986; (b) a construction code official certifies,  
22 based upon a visual exterior survey, that the unit is in compliance  
23 with pertinent construction code standards with respect to structural  
24 elements, roofing, siding, doors and windows; (c) the household  
25 occupying the unit certifies in writing, under penalty of perjury, that  
26 it receives no greater income than that established pursuant to  
27 section 4 of P.L.1985, c.222 (C.52:27D-304) to qualify for  
28 moderate income housing; and (d) the unit for which credit is  
29 sought is affordable to low and moderate income households under  
30 the standards established by the council at the time of filing of the  
31 petition for substantive certification. It shall be sufficient if the  
32 certification required in subparagraph (c) is signed by one member  
33 of the household. A certification submitted pursuant to this  
34 paragraph shall be reviewable only by the council or its staff and  
35 shall not be a public record;

36       Nothing in P.L.1995, c.81 shall affect the validity of substantive  
37 certification granted by the council prior to November 21, 1994, or  
38 of a judgment of compliance entered by any court of competent  
39 jurisdiction prior to that date. Additionally, any municipality that  
40 received substantive certification or a judgment of compliance prior  
41 to November 21, 1994 and filed a motion prior to November 21,  
42 1994 to amend substantive certification or a judgment of  
43 compliance for the purpose of obtaining credits, shall be entitled to  
44 a determination of its right to credits pursuant to the standards  
45 established by the Legislature prior to P.L.1995, c.81. Any  
46 municipality that filed a motion prior to November 21, 1994 for the  
47 purpose of obtaining credits, which motion was supported by the  
48 results of a completed survey performed pursuant to council rules,

1 shall be entitled to a determination of its right to credits pursuant to  
2 the standards established by the Legislature prior to P.L.1995, c.81;

3 (2) Municipal adjustment of the present and prospective fair  
4 share based upon population, available vacant and developable land,  
5 infrastructure considerations or environmental or historic  
6 preservation factors and adjustments shall be made whenever:

7 (a) The preservation of historically or important architecture and  
8 sites and their environs or environmentally sensitive lands may be  
9 jeopardized,

10 (b) The established pattern of development in the community  
11 would be drastically altered,

12 (c) Adequate land for recreational, conservation or agricultural  
13 and farmland preservation purposes would not be provided,

14 (d) Adequate open space would not be provided,

15 (e) The pattern of development is contrary to the planning  
16 designations in the State Development and Redevelopment Plan  
17 prepared pursuant to sections 1 through 12 of P.L.1985, c.398  
18 (C.52:18A-196 et seq.),

19 (f) Vacant and developable land is not available in the  
20 municipality, and

21 (g) Adequate public facilities and infrastructure capacities are  
22 not available, or would result in costs prohibitive to the public if  
23 provided.

24 (3) (Deleted by amendment, P.L.1993, c.31).

25 d. Provide population and household projections for the State  
26 and housing regions;

27 e. In its discretion, place a limit, based on a percentage of  
28 existing housing stock in a municipality and any other criteria  
29 including employment opportunities which the council deems  
30 appropriate, upon the aggregate number of units which may be  
31 allocated to a municipality as its fair share of the region's present  
32 and prospective need for low and moderate income housing. An  
33 allocation of units to a municipality as its fair share shall not exceed  
34 an amount that would result in an increase of the municipal  
35 population by more than five percent in any 10-year period. For the  
36 purposes of this limit, each unit of affordable housing shall be  
37 deemed to be occupied by four residents, except that units of  
38 housing for seniors shall be deemed to be occupied by two  
39 residents. No municipality shall be required to address a fair share  
40 of housing units affordable to households with a gross household  
41 income of less than **【80%】** 80 percent of the median gross  
42 household income beyond the lesser of: (1) the number of units that  
43 represent housing for five percent of a municipality's population; or  
44 (2) 1,000 units within 【ten】 10 years from the grant of substantive  
45 certification, unless it is demonstrated, following objection by an  
46 interested party and an evidentiary hearing, based upon the facts  
47 and circumstances of the affected municipality that it is likely that  
48 the municipality through its zoning powers could create a realistic

1 opportunity for more than: (1) the number of low and moderate  
2 income units that would represent housing for a five percent  
3 increase of the municipal population; or (2) 1,000 low and moderate  
4 income units in a municipality where 1,000 units would represent  
5 housing for less than five percent of the municipal population,  
6 within that **【ten-year】** 10-year period. For the purposes of this  
7 section, the facts and circumstances which shall determine whether  
8 a municipality's fair share shall exceed 1,000 units, as provided  
9 above, shall be a finding that the municipality has issued more than  
10 5,000 certificates of occupancy for residential units in the **【ten-**  
11 **year】** 10-year period preceding the petition for substantive  
12 certification in connection with which the objection was filed.

13 For the purpose of crediting low and moderate income housing  
14 units in order to arrive at a determination of present and prospective  
15 fair share, as set forth in paragraph (1) of subsection c. of this  
16 section, housing units comprised in a community residence for the  
17 developmentally disabled, as defined in section 2 of P.L.1977,  
18 c.448 (C.30:11B-2), shall be fully credited pursuant to rules  
19 promulgated or to be promulgated by the council, to the extent that  
20 the units are affordable to persons of low and moderate income and  
21 are available to the general public.

22 The council, with respect to any municipality seeking substantive  
23 certification, shall require that a minimum percentage of housing  
24 units in any residential development resulting from a zoning change  
25 made to a previously non-residentially-zoned property, where the  
26 change in zoning precedes or follows the application for residential  
27 development by no more than 24 months, be reserved for occupancy  
28 by low or moderate income households, which percentage shall be  
29 determined by the council based on economic feasibility with  
30 consideration for the proposed density of development.

31 In carrying out the above duties, including, but not limited to,  
32 present and prospective need estimations the council shall give  
33 appropriate weight to pertinent research studies, government  
34 reports, decisions of other branches of government, implementation  
35 of the State Development and Redevelopment Plan prepared  
36 pursuant to sections 1 through 12 of P.L.1985, c.398 (C.52:18A-196  
37 et seq.) and public comment. To assist the council, the State  
38 Planning Commission established under that act shall provide the  
39 council annually with economic growth, development and decline  
40 projections for each housing region for the next **【ten】** 10 years.  
41 The council shall develop procedures for periodically adjusting  
42 regional need based upon the low and moderate income housing  
43 that is provided in the region through any federal, State, municipal  
44 or private housing program.

45 No housing unit subject to the provisions of section 5 of  
46 P.L.2005, c.350 (C.52:27D-123.15) and to the provisions of the  
47 barrier free subcode adopted by the Commissioner of Community  
48 Affairs pursuant to the "State Uniform Construction Code Act,"

1 P.L.1975, c.217 (C.52:27D-119 et seq.) shall be eligible for  
2 inclusion in the municipal fair share plan certified by the council  
3 unless the unit complies with the requirements set forth thereunder.

4 The council shall not order a non-redevelopment housing project  
5 on undeveloped land unless the council makes a determination that  
6 such a project would counteract exclusionary zoning practices  
7 occurring in the municipality at the time the order is made.  
8 (cf: P.L.2008, c.46, s.6)  
9

10 3. Section 1 of P.L.1995, c.231 (C.52:27D-310.1 et seq.) is  
11 amended to read as follows:

12 1. When computing a municipal adjustment regarding available  
13 land resources as part of the determination of a municipality's fair  
14 share of affordable housing, the Council on Affordable Housing  
15 shall exclude from designating as vacant land:

16 (a) any land that is owned by a local government entity that as  
17 of January 1, 1997, has adopted, prior to the institution of a lawsuit  
18 seeking a builder's remedy or prior to the filing of a petition for  
19 substantive certification of a housing element and fair share plan, a  
20 resolution authorizing an execution of agreement that the land be  
21 utilized for a public purpose other than housing;

22 (b) any land listed on a master plan of a municipality as being  
23 dedicated, by easement or otherwise, for purposes of conservation,  
24 park lands or open space and which is owned, leased, licensed, or in  
25 any manner operated by a county, municipality or tax-exempt,  
26 nonprofit organization including a local board of education, or by  
27 more than one municipality by joint agreement pursuant to  
28 P.L.1964, c.185 (C.40:61-35.1 et seq.), for so long as the entity  
29 maintains such ownership, lease, license, or operational control of  
30 such land;

31 (c) any vacant contiguous parcels of land in private ownership  
32 of a size which would accommodate fewer than five housing units if  
33 current standards of the council were applied pertaining to housing  
34 density;

35 (d) historic and architecturally important sites listed on the State  
36 Register of Historic Places or National Register of Historic Places  
37 prior to the submission of the petition of substantive certification;

38 (e) agricultural lands when the development rights to these  
39 lands have been purchased or restricted by covenant;

40 (f) sites designated for active recreation that are designated for  
41 recreational purposes in the municipal master plan; **[and]**

42 (g) environmentally sensitive lands where development is  
43 prohibited by any State or federal agency; and

44 (h) any land that is (1) lower than the most recent flood  
45 elevation determination, measured pursuant to federal standards, (2)  
46 lower than the applicable flood elevation standard required under  
47 regulations adopted pursuant to the "Flood Hazard Area Control  
48 Act," P.L.1962, c.19 (C.58:16A-50 et seq.), or (3) within 100 feet of

1 category one waters designated by the Department of  
2 Environmental Protection, pursuant to the "Water Pollution Control  
3 Act," P.L.1977, c.74 (C.58:10A-1 et seq.), or any other law, or any  
4 rule or regulation adopted pursuant thereto.

5 No municipality shall be required to utilize for affordable  
6 housing purposes land that is excluded from being designated as  
7 vacant land.

8 (cf: P.L.2008, c.46, s.39)

9  
10 4. Section 15 of P.L.1985, c.222 (C.52:27D-315) is amended to  
11 read as follows:

12 15. a. The council shall engage in a mediation and review  
13 process in the following situations: (1) if an objection to the  
14 municipality's petition for substantive certification is filed with the  
15 council within the time specified in section 14 of this act; **or** (2) if  
16 a request for mediation and review is made pursuant to section 16  
17 of this act ; or if the municipality challenges an order issued by the  
18 council to construct a non-redevelopment housing project on  
19 undeveloped land not later than the 30th day after the order was  
20 issued.

21 b. (1) In cases in which an objection is filed to substantive  
22 certification the council shall meet with the municipality and the  
23 objectors and attempt to mediate a resolution of the dispute. If the  
24 mediation is successful, the council shall issue a substantive  
25 certification if it finds that the criteria of section 14 of this act have  
26 been met.

27 (2) In cases where a municipality challenges a non-  
28 redevelopment housing project on undeveloped land ordered by the  
29 council, the order of the council shall be overturned unless it is  
30 determined that the council's order is based on exclusionary zoning  
31 practices occurring in the municipality at the time the order is made.

32 c. If the mediation efforts are unsuccessful, the matter shall be  
33 transferred to the Office of Administrative Law as a contested case  
34 as defined in the "Administrative Procedure Act," P.L. 1968, c. 410  
35 (C. 52:14B-1 et seq.).

36 The Office of Administrative Law shall expedite its hearing  
37 process as much as practicable by promptly assigning an  
38 administrative law judge to the matter; promptly scheduling an  
39 evidentiary hearing; expeditiously conducting and concluding the  
40 evidentiary hearing; limiting the time allotted for briefs, proposed  
41 findings of fact, conclusions of law, forms of order or other  
42 disposition, or other supplemental material; and the prompt  
43 preparation of the initial decision. A written transcript of all oral  
44 testimony and copies of all exhibits introduced into evidence shall  
45 be submitted to the council by the Office of Administrative Law  
46 simultaneously with a copy of the initial decision. The evidentiary  
47 hearings shall be concluded and the initial decision issued no later  
48 than 90 days after the transmittal of the matter as a contested case to



1 the Office of Administrative Law by the council, unless the time is  
2 extended by the Director of the Office of Administrative Law for  
3 good cause shown.

4 (cf: P.L.1985, c.222, s.15)

5  
6 5. (New section) The Department of Environmental Protection  
7 shall, pursuant to the "Administrative Procedure Act," P.L.1968,  
8 c.410 (C.52:14B-1 et seq.), adopt rules and regulations, by the first  
9 day of the seventh month next following enactment, to guide  
10 determinations of flood-prone lands excluded from available land  
11 resources for affordable housing purposes pursuant to section 3 of  
12 P.L. , c. (C. ) (pending before the Legislature as this  
13 bill).

14  
15 6. This act shall take effect immediately, but section 3 shall  
16 remain inoperative until the first day of the seventh month next  
17 following enactment.

#### 18 19 20 STATEMENT

21  
22 This bill allows a municipality to challenge an order by the  
23 Council on Affordable Housing (COAH) to construct, or allow to be  
24 constructed, a non-redevelopment housing project on undeveloped  
25 land. The municipal challenge would be successful, unless the  
26 order by COAH is based on exclusionary zoning practices occurring  
27 in the municipality at the time the order is made.

28 Additionally, this bill caps the number of units a municipality  
29 may have allocated as its fair share affordable housing obligation  
30 with regard to the size of the municipal population. Current law  
31 provides that no municipality shall be required to address a fair  
32 share of affordable housing units beyond 1,000 low and moderate  
33 income units within 10 years from the grant of substantive  
34 certification; except that a municipality may be allocated more than  
35 1,000 units if, based upon an evidentiary hearing, it is found likely  
36 that the municipality, through its zoning powers, could create a  
37 realistic opportunity for more than 1,000 low and moderate income  
38 units within that 10-year period. For some municipalities in the  
39 State, this many additional units may increase the overall municipal  
40 population dramatically. In order to prevent the disparate impact  
41 this can create for municipalities with small populations, this bill  
42 provides that an allocation of units to a municipality as its fair share  
43 shall not exceed an amount that would result in an increase of the  
44 municipal population by more than five percent.

45 Finally, this bill requires the exclusion of flood-prone land when  
46 computing a municipal adjustment of available land resources as  
47 part of the determination of a municipality's fair share affordable  
48 housing obligation. Currently, land may not be considered in

1 determining a municipality's available land resources for affordable  
2 housing purposes if it contains any one of various special features,  
3 consisting of: (a) land owned by a government entity, and intended  
4 for a public purpose, (b) certain park land, open space and other  
5 land dedicated for conservation, (c) certain very small land parcels  
6 held in private ownership, (d) historic and architecturally important  
7 sites, (e) agricultural land with restricted development rights, (f)  
8 sites designated for active recreation, and (g) environmentally  
9 sensitive land where development is prohibited by law.

10 This bill would also exclude from determinations of available  
11 land resources for affordable housing purposes any land that is (1)  
12 lower than the most recent "flood elevation determination,"  
13 measured under federal standards, (2) lower than the applicable  
14 flood elevation standard required under regulations adopted  
15 pursuant to the "Flood Hazard Area Control Act," P.L.1962, c.19  
16 (C.58:16A-50 et seq.), or (3) within 100 feet of category one  
17 waters, as designated by the Department of Environmental  
18 Protection. As defined under 44 C.F.R.59.1, a "flood elevation  
19 determination" refers to a determination by the Federal Insurance  
20 Administrator of the water surface elevations of a "base flood," also  
21 understood as a flood level that has a one percent or greater chance  
22 of occurrence in any given year.

23 This bill directs the Department of Environmental Protection to  
24 adopt rules and regulations to guide determinations of flood-prone  
25 lands by the first day of the seventh month next following  
26 enactment. This bill remains inoperative until the first day of the  
27 seventh month next following enactment.